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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection	)	MD Docket No. 98-36
of Regulatory Fees for	)	
Fiscal Year 1998	)	

REPLY COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

Comcast Cellular Communications, Inc. ("Comcast"), a CMRS provider, hereby submits its *Reply Comments* in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1/] Comcast supports the concerns expressed by commenters that question the FCC's ever-increasing regulatory fees. Congress established the FCC's regulatory fee system to recover, in part, the costs of identifiable regulatory activities. The methodology the Commission has proposed to establish those fees, however, strays from Congressional intent. In particular, the creation of a 25 percent "revenue ceiling cap" and the use of an "adjusted activity cost" result in the FCC's proposed fees constituting an unlawful tax.

Comcast urges the FCC to reconsider its proposed 1998 regulatory fee structure, especially in light of the many new fees, forms and mandates that have been presented to the CMRS industry over the past year. As with any of its regulatory mandates, the Commission must consider the competitive impact of its regulatory fee scheme on each of the different segments of the telecommunications industry, including on CMRS providers.

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1/ *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, Notice of Proposed Rulemaking, MD Docket No. 98-36, FCC 98-40 (released March 25, 1998) (the "*Notice*").

I. A FEE IS NOT A FEE, BUT RATHER IS A TAX, IF IT DOES NOT BEAR A SUBSTANTIAL RELATION TO THE COSTS OF REGULATION.

Congress established the FCC's regulatory fee system, codified as Section 9 of the Communications Act of 1934, as amended, as part of the Omnibus Budget Reconciliation Act of 1993.[2/] Section 9 was drafted to ensure that the FCC had solid authority to collect regulatory fees that bear some relationship to the cost of regulating particular FCC licensees.

Regulatory assessments are "fees" only when they bear a substantial relation to the costs of regulation. Assessments that are not so related are taxes.[3/] This distinction between fees and taxes is longstanding, and has been affirmed by the Supreme Court as recently as this March in a case that held that a fee assessed upon exporters by the government for harbor maintenance was instead an impermissible tax.[4/] Indeed, in *NCTA v. United States*, the Supreme Court upheld the FCC's ability to assess an annual fee per community antenna television system ("CATV") subscriber because the fee reflected "value to the recipient."[5/] The Court found that while taxation is a legislative function reserved solely for Congress, agencies may charge fees for the rendering of services that bestow a benefit on an applicant not shared by other members of society.[6/] While the Court upheld the FCC's authority to impose a regulatory fee, it also

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2/ Pub. L. No. 103-66, Title VI, 6002(a), 107 Stat 397 (approved August 10, 1993). Section 9 is codified at 47 U.S.C. § 159.

3/ *See, e.g.,* Comments of PanAmSat Corporation at 3; Comments of Loral Space & Communications Ltd. at 4 n.13.

4/ *United States v. United States Shoe Corp.*, No. 97-372, slip op. at 8 (U.S. March 31, 1998) (The Harbor Maintenance Tax is an impermissible tax on exports rather than a permissible user fee because it was tied to the value of the cargo exported and was not based on a fair approximation of port use).

5/ *NCTA v. United States,* 415 U.S. 336, 342-43 (U.S. 1974).

6/ *Id.* at 340-41.

remanded the case so that the FCC could ensure that the particular fee accurately reflected the "value to the recipient."[7/]

In Section 9, Congress expressly permitted the FCC to assess and collect regulatory fees to recover the costs associated with its "enforcement activities, policy and rulemaking activities, user information services, and international activities."[8/] Congress directed the FCC to base the fees on actual employee costs, "adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities . . . ."[9/] By including language requiring the FCC to tie its regulatory fees to the benefits provided to the payor, Congress mirrored the language the courts have used to distinguish permissible fees from impermissible taxes.

However, the Commission is starting to blur the distinction between fees and taxes. Rather than establishing regulatory fees that are "reasonably related to the benefits provided to the payor," the FCC has created a 25 percent "revenue ceiling cap" that the FCC admits provides a "certain amount of subsidization between fee payer classes."[10/] This intentional subsidization causes the Commission's entire regulatory fee system to no longer reasonably reflect the "value to the recipient." By considering factors other than the "benefits bestowed by the Government," the FCC's proposed regulatory fee system has taken on tax-like characteristics.[11/]

7/ *Id.* at 344.

8/ 47 U.S.C. § 159(a)(1); *see also* Comments of Loral Space & Communications Ltd. at 1.

9/ 47 U.S.C. § 159(b)(1)(A).

10/ *Notice* at ¶ 18. *See also* Comments of Small Business in Telecommunications at 2.

11/ *See, e.g., NCTA v. U.S.*, 415 U.S. 336 at 341-42. *See also* Comments of Small Business in Telecommunications at 2; Comments of PanAmSat Corporation at 3; Comments of

(continued...)

Comcast urges the Commission to eliminate the "revenue ceiling cap" so that every fee payor group will bear its own costs. While elimination of the cap may substantially increase regulatory fees for certain fee paying classes, the increase will be neither unduly burdensome nor unfair if payers are told of the increase sufficiently in advance.[12/] If, however, the Commission continues to apply a 25 percent revenue ceiling cap and in so doing continues to promote subsidization, the fees paid by certain classes will increasingly be removed from the benefits received and increasingly take on the characteristics of an unlawful tax.

II. THE COMMISSION SHOULD RELEASE DETAIL SUPPORTING ITS COST ALLOCATIONS.

Comcast also agrees with those commenters that urge the Commission to release more detailed information regarding how it calculates regulatory fees using the Commission's cost accounting system. If the "adjusted activity costs" for a fee category are incorrectly calculated, the fee will "bear no relationship to the benefit accorded" and will also be at legal risk.

Several industry groups have questioned the FCC's fee calculations. The satellite industry comments, for example, claim that the regulatory fee proposed to be assessed against geostationary space station operators is far out of proportion to the actual cost of regulating the industry.[13/] Similarly, the Personal Communications Industry Association, representing both broadband and narrowband CMRS providers, questions the accuracy of the FCC's cost

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11/ (...continued)
Loral Space & Communications Ltd. at 4.

12/ Further, requiring all fee paying classes to be self supporting is the only method of assessing regulatory fees that is not inconsistent with the promotion of competition.

13/ *See* Comments of PanAmSat Corporation; Comments of Loral Space & Communications Ltd.; Comments of Columbia Communications Corporation; Comments of GE American Communications, Inc.; Comments of the Satellite Industry Association; Comments of Orbital Communications Corporation.

accounting system.[14/] Among other things it is not clear whether auction-related activities have been included in determining the activity costs of CMRS carriers. Given the nature of the auctions, Comcast contends that would be improper. In any event, Comcast urges the Commission to release sufficient information about its cost accounting system so that regulatory fee payers can determine what types of regulatory activities are included or excluded from the calculation of the fee amounts presented.[15/]

III. FEE-RELATED ACTIVITIES IMPOSE INCREASING ADMINISTRATIVE BURDENS ON TELECOMMUNICATIONS PROVIDERS AND THEIR USERS.

It is at least ironic in this era of deregulation that CMRS (the most competitive segment of the telecommunications industry) is increasingly faced with new fees, forms and government mandates. CMRS providers must now pay four different types of fees related to being a service provider. Each fee is calculated in a different way using a different form and requiring different information. And it seems as if each year another fee, for yet another purpose, calculated in yet another manner, is established. Indeed, each of the four fees CMRS providers face has been adopted in the past five years.

As it has for the past few years, the FCC proposes to assess broadband CMRS regulatory fees on a per-line basis. The other fees that fund other federal telecommunications programs, however, each require different calculations, sometimes derived from data not easily available or calculable by CMRS providers.[16/] This is nowhere more the case than for CMRS providers who

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14/ *See* Comments of the Personal Communications Industry Association.

15/ *See, e.g.*, Comments of the Personal Communications Industry Association; Comments of Orbital Communications Corporation; Comments of Columbia Communications Corporation.

16/ A discussion of each program's assessment process in the attached Appendix A

(continued...)

have never maintained books on a Uniform System of Accounts ("USOA") basis and who cannot simply apply LEC-based formulas to complete these forms.

Because of the ever-increasing federal mandates which have no apparent end in sight, and because CMRS carriers lack the subsidies customarily received by ILECs, CMRS carriers have no choice but to reflect the ever-increasing costs of regulation in their end user charges. Comcast therefore, once again, urges the Commission to consider the impact of additional fees and mandates on the CMRS industry when it sets fees and policies. As Comcast has previously observed: "[p]olicies which may be appropriate for monopoly LECs or large IXCs may require modifications for CMRS carriers whose markets are currently more competitive and are becoming increasingly competitive, whose markets are less well penetrated and are therefore in a radically different phase of development (whether in terms of revenue, price or network capacity), and who are technologically and jurisdictionally different from all others."[17/] Absent

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16/ (...continued)
illustrates this point.

17/ *See* Petition for Reconsideration and Comments on Further Notice of Proposed Rulemaking of Comcast Cellular Communications, Inc., *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year* 1997, MD Docket No. 96-186 (filed August 11, 1997) at 5-6. Comcast's Reconsideration Petition is still pending.

Commission recognition and consideration of the often unique nature of the competitive CMRS industry when setting policy, consumers will pay higher prices and will be offered fewer choices for CMRS service.

Respectfully submitted,

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APPENDIX A
NEW FEDERAL FUNDING MANDATES

TRS FUND. Established in 1993 for all common carriers providing interstate telecommunications services, the Telecommunications Relay Services ("TRS") fund is used to provide interstate telecommunications relay service for persons with hearing or speech disabilities. Carriers fill out forms on a yearly basis that report a carrier's *"total interstate revenues"* for the prior calendar year without breakout of regulated and non-regulated service revenues. These reported revenues are combined with an annual contribution factor to derive the carrier's payment obligation and payments are made annually. Each licensee that provides interstate telecommunications services files separately.

REGULATORY FEES. Established in 1994 for all FCC regulatees, regulatory fees are used to recover the Commission's costs incurred in enforcement activities, policy and rulemaking activities, user information services, and international activities on behalf of classes of Commission regulatees. Unlike the other fees, CMRS regulatory fees are based on one simple number: the number of telephone numbers assigned to a CMRS carrier's customers. Payments are made annually. The *Notice* acknowledges that regulatory fees in 1998 for CMRS providers will be in excess of actual activity cost levels.

UNIVERSAL SERVICE. Established in 1997 for all telecommunications carriers, the universal service fund is used to defer the costs of telephone service for certain low-income consumers and high-cost areas and advanced communications capability for schools, libraries, and health care providers. Contributions are determined by deducting certain revenue to arrive at *"end-user telecommunications revenues"* although carriers are required to report and jurisdictionally classify their gross revenues from all sources, including non-regulated and non-telecommunications services, as part of their twice yearly universal service reporting requirement. These reported revenues are combined with a quarterly contribution factor to derive the carrier's payment obligation and payments are made semi-annually.

"End-user telecommunications revenues" are based on "telecommunications" charges only (whether or not collected and therefore actually constituting revenue) made by a carrier directly to an end-user, and consequently are different from "total interstate revenues." CMRS providers have identified a number of difficulties they have in completing the universal service form. For example, the form is designed to allow easy importation of ILEC USOA data, but CMRS providers do not keep their accounting records in USOA formats. CMRS is also not subject to jurisdictional separations and cannot easily classify revenues (such as a monthly access fee) as either interstate or intrastate. CMRS licensees typically do not maintain separate accounting books for each licensee at the level of detail required to determine "end-user telecommunications revenues," therefore reporting cannot be made on the basis the form specifies. CMRS providers have been requesting guidance from the FCC since August of last year to deal with these problems, as well as the problem of bundled service pricing, but are still awaiting a response.

NANPA FUND. Established in 1998 for all interstate common carriers, the North American Numbering Plan ("NANPA") fund is used to pay for the costs associated with the administration of the North American Numbering Plan. Contributions are determined by a carrier's *"net telecommunications revenue"* for the prior calendar year. "Net

telecommunications revenue" is computed by taking a carrier's reported gross revenue figure from the TRS Fund Form (line 15b) and subtracting the amount of payments made to other carriers to arrive at a "net telecommunications revenue" figure. These reported revenues are combined with an annual contribution factor to derive the carrier's payment obligation and payments are made monthly. As identified above, CMRS providers typically do not keep accounting records on a licensee basis and can thus only estimate what each licensees' net revenue would be. An additional issue for NANPA calculations is that interconnection payments made to ILECs are not made on a licensee basis, making calculation more difficult.